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In The

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1290

JO ANNE ATWELL,

Petitioner,

v.

RETAIL CREDIT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Daily Record Co., Baltimore, Md. 21201

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Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit, to review its judgment entered the 4th day of November, 1970.

CITATIONS TO OPINION BELOW

The Opinion of United States Court of Appeals for the Fourth Circuit is published in 431 F. 2d 1068, and is appended hereto (App. 1a-7a).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was rendered September 30, 1970. Petitioner's re-

quest for rehearing was denied November 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Petitioner's action for libel was originally filed in the Superior Court of Baltimore City. Respondent removed same to the United States District Court for the District of Maryland, by virtue of diversity of citizenship.

QUESTIONS PRESENTED

1. Was Petitioner deprived of her Constitutional rights to *Due Process of Law* and/or *Equal Protection of the Laws* by the holding of the Lower Court that the Statute of limitations bars Petitioner's action for libel brought more than one year after the publication of Respondent's confidential defamatory credit report, the existence of which was then unknown and inherently unknowable to Petitioner?

2. Did the Court of Appeals deprive Petitioner of her Constitutional right to Trial by Jury by making its own findings of fact contrary to the evidence in the record, and contrary to the findings of fact by the Jury? (The result of which was a holding by the Court of Appeals that the District Court improperly submitted Petitioner's action to the Jury.)

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States providing, in relevant part, that ". . . no State shall deprive a citizen of the United States of life, liberty or property without due process of Law. . . ."

2. The Seventh Amendment to the Constitution of the United States providing that: "In Suits at common law, were the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact

tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law".

STATUTES INVOLVED

The pertinent sections of the Maryland statute of limitations, Sections 1 and 14 of Article 57 of the Maryland Code set forth in the Appendix (8a).

STATEMENT

Retail Credit issued four defamatory credit reports about Petitioner to various insurance companies on the following dates:

August 16, 1955—State Farm Mutual Insurance Co.

August 11, 1955—Monumental Life Insurance Co.

June 27, 1955—Employers Mutual Casualty Co. (Insurance).

May 18, 1957—Paramount Insurance Co.

The substance of each report was that "Petitioner's personal reputation suffered to a large degree in the community due to immoral relationship with other women". "This was cause of divorce . . .". There was no evidence to support these statements.

Each of the named insurance companies were customers of the Respondent, and each had contracted not to disclose the contents or origin of credit reports purchased by them.

As a result, prior to filing suit on September 6, 1957, Petitioner had never seen any of the defamatory reports, and did not know the specific dates and contents of the libelous reports until the reports were produced by Respondent in response to discovery proceedings, after suit was instituted.

Following Respondent's 1965 report to State Farm Mutual Insurance Company, Petitioner's insurance was cancelled. Afterwards, in 1966, Petitioner was refused life insurance by Monumental Life Insurance Company. Her attempts to find out the cause of the rejections were fruitless.

In 1966, Petitioner applied to Emcasco for automobile insurance, and on June 27, 1966 Respondent wrote its libelous credit report about her. However, through administrative error, Emcasco granted her insurance. In May, 1967, Emcasco cancelled Petitioner effective on the policy's anniversary.

After the Emcasco cancellation, on May 4, 1967, Petitioner took up her problems with Thomas V. Murphy, an official in the Maryland Insurance Department, who told her the cancellation had something to do with her divorce, and as long as she continued to live with another girl, she would never be able to get automobile or life insurance. Mr. Murphy did not disclose to her that the insurance companies were cancelling her based on the libelous information in Respondent's credit reports. As a layman, not connected with the insurance or credit reporting industry, Petitioner had no way of knowing that Retail Credit caused her troubles.

On May 12, 1967, the Insurance Commissioner wrote to Emcasco stating that there was no basis for its cancellation.

About the same time, Petitioner discussed her insurance problem with a friend, Charlotte Cowan, and (as found by the Jury), Mrs. Cowan, unknown to Petitioner, mentioned the problem to Eunice Evans, an employee of Paramount Insurance Company, and an acquaintance of Petitioner. On her own initiative, Eunice Evans, without the knowledge of either Plaintiff or Mrs. Cowan, ordered

the credit report which was rendered by Respondent to Paramount on May 18, 1967. Eunice Evans orally disclosed to Mrs. Cowan the substance of the defamations in the Paramount report, but did not actually show the report to Mrs. Cowan. Both ladies agreed not to say anything about it, and Miss Evans took the report home, showing it to no one until her deposition was taken in December, 1967.

However, Mrs. Cowan felt that the Petitioner should know about the contents of the report, so she related to Petitioner what Eunice Evans had told her. Thus, *for the first time*, Mrs. Atwell knew that Retail Credit was involved in her life.

Though the Paramount report had a reference to earlier credit reports to State Farm and Emcasco, these references were not mentioned by Miss Evans to Mrs. Cowan, nor by Mrs. Cowan to Petitioner, and at no time did Petitioner see the offending reports. Following Mrs. Cowan's disclosure, Petitioner called Retail Credit and made an appointment with one Joseph Cronin, manager of Respondent's Catonsville branch office, for June 7, 1967. At that time, she had no knowledge of any reports published by Retail Credit, other than the oral disclosure to her of the defamatory information in the Paramount report. At that time, had the Petitioner known of the *Emcasco report* and its defamatory contents, she would still have had twenty days to file her Declaration before the statute ran.

Petitioner contends that there was ample evidence submitted at trial that, at the meeting on June 7, 1967, Mr. Cronin was guilty of various concealments, misrepresentations and false promises, which had the effect of concealing from her, knowledge of the June 27, 1966 report to Emcasco, on which limitations was about to expire. Petitioner

contends these misrepresentations, etc., lulled her into a sense of security and caused her to believe that she would soon know the full truth and rectification would be forthcoming. Mr. Cronin told Petitioner that Retail Credit would get in touch with her shortly and supply her with information about other reports. The jury undoubtedly found that delay was unnecessary since the information was right at hand and the temporizing of Mr. Cronin had the effect of giving his employer the time needed to permit the statute to run. Even when the Respondent did contact an attorney and her action was brought on September 8, 1967, the Respondent had still not supplied information on the previous reports as promised and Petitioner was unable to supply her attorneys with any information concerning the Emcasco report. The initial complaint filed by Petitioner's attorney alleged that Respondent "on numerous occasions extending through a 12 month period, beginning July, 1966" published libelous credit reports to its subscribers. The dates in the original complaint indicate Petitioner and her attorney lacked knowledge about the Emcasco report and earlier reports, even in September of 1967. After discovery, Petitioner's complaint was amended to read "on numerous occasions extending for a 24 month period beginning in July 1965."

Respondent filed various defenses to Petitioner's action, including Statute of Limitations. In Maryland, under Section 1 of Article 57 of the Annotated Code of Maryland (App. 9a), actions of defamation must be brought "within one year from the time the cause of action accrued."

At trial, before the case was submitted to the Jury, Petitioner asserted that limitations should begin to run from the time the Plaintiff discovered the wrong against her. (Transcript pp. 749-754). The District Court ruled

(Transcript pp. 774-775), that her causes of action on the State Farm, Monumental and Emcasco reports were barred by limitations, but permitted the Emcasco report of June 27, 1966 to be submitted to the Jury on the theory that the Respondent had committed fraud in concealing the contents of the Emcasco report from Petitioner, as permitted by Section 14 of Article 57 of Maryland Code (App. 9a). The case was also submitted to the Jury on the Paramount report of May 18, 1967, in which no limitations question was involved.

The Jury rendered a verdict in favor of Plaintiff on both reports, giving damages of One Hundred Thousand ($100,000.00) Dollars compensatory damages and Five Hundred Thousand ($500,000.00) Dollars punitive damages on the Emcasco report, and no damages on the Paramount report. By Remittitur, the punitive damages were later reduced from Five Hundred Thousand ($500,000.00) Dollars to Two Hundred Fifty Thousand ($250,000.00) Dollars.

Respondent appealed the Judgment of the District Court to the United States Court of Appeals for the Fourth Circuit on various grounds. In its Opinion dated September 30, 1970, the Court of Appeals held that the lower court should not have submitted the cause on the Emcasco report of June 27, 1966 to the Jury holding that (a) In Maryland, the cause of action "accrued" at the time the wrong was committed, which it construed as time of publication, and not the time of the discovery of the libel (App. 3a-4a), and (b) Petitioner had produced insufficient evidence of fraudulent concealment of Petitioner's cause of action by Respondent to submit that issue to the Jury (App. 4a-7a). Consequently, the Court of Appeals reversed the judgment of the District Court and remanded the case for entry of a judgment for Respondent. Petition for re-hearing was

denied November 4, 1970. From that Judgment, this Writ is prayed.

REASONS FOR GRANTING CERTIORARI

I.

LIMITATIONS — DEPRIVATION OF DUE PROCESS

The question of whether the Constitutional guarantee of due process, affords the victim of an undiscoverable tort a reasonable opportunity to bring suit, has not been, but should be settled. Alternatively, the Lower Courts' ruling on this question has been decided in a manner in conflict with this Court's decision in *Urie v. Thompson*, 337 U.S. 163 (1949). Because of the far reaching effects that the credit reporting industry has on the life of the ordinary citizen in our economy, and the importance of the question here raised when applied to similar cases, Petitioner suggests that Certiorari should be granted.

Deprivation of due process by interposition of limitations upon a claim on a tort unknown to the injured person has rarely been discussed. However, this Court, without touching on the Constitutional aspect of the problem, has clearly indicated that fundamental fairness requires that when a cause of action is unknown and inherently unknowable even in retrospect, the time for bringing the cause of action must run from the moment in which the injured party learns of his right of action. The leading case in this respect is *Urie v. Thompson*, 337 U.S. 163 (1949), in which a railroad engineer had been exposed to silica dust from the time of his employment in 1910. He had apparently unknowingly contracted silicosis many years prior to filing suit. His action, under the applicable Federal Compensation Act, was brought within three years after he became too ill to work, and his condition was diagnosed. As stated by Mr. Justice Rutledge:

"If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statue of limitations a disease whose symptoms had not yet been obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability." (337 U.S. p. 169). (Emphasis supplied.)

"We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specific period of time after notice of the invasion of legal rights." (337 U.S. p. 170).

Just as plainly, Petitioner's cause of action was inherently unknowable to her at the time that the harm occurred. The defamatory publications were made to subcribers of Retail Credit under agreements between the subscribers and Retail Credit, in which the reports were to remain confidential. Without knowing that the Emcasco report had been published, the earliest moment when Petitioner was able to identify the tortfeasor who was causing her harm, was at that moment in early June, 1967, when Mrs. Cowan orally told her about the defamatory remarks in the report of May 18, 1967 to Paramount. At that moment, and at that moment only, could she then begin to take some effective action against the tortfeasor. It would be extremely unjust and unfair if she were not allowed the full reasonable period of limitations given by Article 57, Section 1 of the Maryland Code (one year).

Petitioner urges that the Constitution requires that limitations on her cause of action must run from no earlier than one year from that date in June, 1967, when first she learned that Retail Credit had entered her life.

In at least one reported case, it has been intimated that without the discovery test, statutes of limitations would be unconstitutional as a deprivation of due process of law. See concurring opinion of Judge McBride in *Ayers v. Morgan*, 397 Pa. 282, 284, 154 A. 2d 788, 794 (1959):

> "Statutes of limitations must be read in the light of this provision ('due process' clause of Pennsylvania constitution) for the running of time is not the only test of validity of such statutes. They are desirable in that they prevent oppression by forbidding plaintiffs to litigate stale claims and thus compel defense at a time when such defense is no longer practicable and sometimes even impossible. Nevertheless, the restrictions imposed may not be so arbitrary as to preclude a reasonable opportunity for one who has been harmed to make his claim. If the legislature were permitted absolute discretion it would not be merely regulating the remedy but would be abolishing it."

Although not specifically on constitutional grounds, in recent years Maryland has applied "the discovery rule" to doctors, *Waldman v. Rohrbaugh*, 241 Md. 137 (1966); to attorneys, *Mumford v. Staton*, 254 Md. 697 (1969); to surveyors, *Mattingly v. Hopkins*, 254 Md. 88 (1969); to architects, *Steelworkers Holding Co. v. Menefee*, 255 Md. 449 (1969); and to accountants, *Feldman v. Grenger*, 255 Md. 288 (1969).

Common sense, as well as fairness, dictates that where a surgeon negligently fails to remove an instrument or towel after operating, the patient need not bring an action for malpractice against the surgeon until the discovery of

the hidden foreign substance (Cf. *Waldman v. Rohrbaugh*, *supra*).

It is respectfully submitted that the philosophy underlying in these various exceptions is based, not on mere reliance on professional expertise, but rather on a recognition of the need to interpret the statute in such a way as to insure justice and fair play to any victim of an inherently unknowable wrong. See *"Developments in the Law — Statutes of Limitations,"* 63 Harvard Law Review 1177 (1950). See also 28 Maryland Law Review 47.

The Plaintiff has been unable to find a Maryland case, nor has she been referred to any, in which a party, who has exercised due diligence in the discovery of his cause of action, has been thereafter barred by the strict application of the statute. In *Killen v. George Washington Cemetery, Inc.*, 231 Md. 337, referred to by the Court of Appeals (App. 3a), the plaintiff knew of the cause of action more than three years before filing suit.

The discovery rule has found application in other specialized kinds of cases. For example, it is commonly held that limitations in trespass actions and other invasions of landowner's rights run from the time that the tortious act occurs (on the presumption that a landowner should know of and be aware of invasions of his own property). However, it has been held, in the interest of substantial justice, that limitations for an action of underground trespass, accompanied by a taking of minerals or other damage, runs from the discovery of the trespass or the time discovery is reasonably possible. *Diamond v. N.J. Bell Telephone Co.*, 51 N.J. 594, 242 A. 2d 622 (1968); *Smith v. Bell Telephone Co.*, 397 Pa. 134, 153 A. 2d 477 (1959); *Lewey v. H. C. Frick Coke Company*, 166 Pa. St. 536, 31 A. 261 (1895); *Bell Corp. v. Bell View Oil Syndicate*, 76 P. 2d 166 (Cal. App., 1938).

Another class of cases where discovery rule applies, is when a resulting trust occurs. It is generally held that the statute of limitations for the breach of a resulting trust begins to run when the Trustee repudiates the trust, asserts some adverse interest or claim or otherwise violates his obligations. However, if his repudiation, or adverse holding or claim is not known to the cestue qui, then the statute of limitations will ordinarily begin to run only from the time when knowledge or notice of the denial of the beneficiaries' rights are brought home to him. *Brauner v. Staup*, 21 Md. 328 (1864); *Arneman v. Arneman*, 43 Wash. 2d 787, 264 P. 2d 258, 45 A.L.R. 2d 370 (1953).

See also *Edgerly v. Schuyler*, 113 So. 2d 737 (Fla., 1959), affmd., as *Miami Beach First Nat. Bank v. Edgerly*, 121 So. 2d 417 (Fla., 1960), 82 A.L.R. 2d 927, which state that limitations run from the discovery of a forged endorsement in an action by a depositor against a bank or wrongful payment of a check.

As mentioned heretofore, in *Urie v. Thompson*, 337 U.S. 163 (1949), this Court has already held in an occupational disease case, where the illness suffered by the Plaintiff, "was unknown and inherently unknowable even in retrospect", limitations run from the diagnosis of the disease.

In light of all the enumerated exceptions, and this Court's holding in *Urie v. Thompson*, there is no foundation for the Lower Court's statement that "there is no exception for libel, nor have we any reason to suppose that this case, were it being tried in the State Courts, would provide an occasion for the creation of an exception" (App. 4a). If the Court of Appeals found no relevant Maryland decision, it should have made an appropriate finding of correct State law. In effect, the Court is sitting as a state court. *C.I.R. v. Estate of Bosch*, 387 U.S. 456, 87 S. Ct. 1776 (1967). Had

the Court of Appeals looked into this question, it would have found that many states, including Maryland, have found such exceptions whenever necessary to sustain justice and due process.

It was well settled that a State is free to regulate court procedure in accordance with its conception of policy and fairness (without violating due process), unless some fundamental principle of justice is violated. The Court has held repeatedly that it is fundamental to the concept of procedural Due Process that any party with an interest in a matter be given appropriate notice of his rights, so that he have a reasonable opportunity to assert his rights. Cf. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 70 S. Ct. 652 (1950). It would seem similarly fundamental to Due Process that the unaware victim of a tort must have reasonable opportunity to assert his rights. This reasonable opportunity should be measured by having the legal period of limitations operate from the time of his awareness. Thus, the Lower Court violated a fundamental principle of justice by holding that there is no exception for an undiscoverable libel just as exists for other undiscoverable torts. The basis of this fundamental principle of justice is the Constitutional right of each citizen to Due Process of Law.

In conclusion, it is submitted that the Lower Courts deprived the Petitioner of her right to Due Process, and in addition its decisions are in conflict with the essence of this Court's holding in *Urie v. Thompson*, and that this Court should grant Petitioner's request for Certiorari to settle this important question of federal law.

II.

DEPRIVATION OF RIGHT OF JURY TRIAL

The Court of Appeals deprived Petitioner of her Constitutional rights to Trial by Jury, under the Seventh

Amendment, by making its own findings of fact contrary to the evidence in the record, and contrary to the findings of fact by the Jury.

The Court of Appeals simply ignored substantial evidence in the record by which the Jury, under proper instructions, had come to a valid conclusion that Retail Credit fraudulently concealed vital information from the Petitioner, misrepresented the action it intended to take on her complaint and temporized for the purpose of gaining time, all of which effectively prevented Petitioner and her attorneys from discovering the fact that the derogatory Encasco report existed, and had been published nearly a year before.

It is well accepted that where a Plaintiff presents competent and substantial evidence of any fact which must be proven to the Jury, it is a deprivation of Plaintiff's rights guaranteed by the Seventh Amendment to the Constitution, to take the case away from the Jury. *Cf. Lyon v. Mutual Benefit Health and Accident Assn.*, 305 U.S. 484, 59 S. Ct. 297 (1939); *Nicholson v. Stroup*, 294 F. 2d 849 (4th Cir., 1957).

Yet as shall be demonstrated herein, in its opinion,* the Court of Appeals proceeded to make its own findings, in conflict with evidence in the record which had been submitted to the Jury, in order to substantiate its holdings. Among these examples are:

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* Petitioner considers it most unfortunate that Chief Judge Haynsworth, who wrote the Lower Court's opinion, had a dental appointment on the date that this case was called for oral argument in the Court of Appeals. Though out of consideration to Chief Judge Haynsworth and the Court of Appeals, Petitioner, as well as Respondent, stipulated to have the case heard orally in his absence, and the oral argument was taped for Judge Haynsworth's review, Petitioner feels compelled to express her regret that Chief Judge Haynsworth wrote the Opinion when he was not present at the oral argument.

A

"Principal reliance is placed on the inference that at the time of the interview Mr. Cronin had in his possession a copy of the Emcasco report and falsely stated that he did not. This inference is totally unsupported" (App. 4a).

"Nothing in the record will support an inference that it was returned to Catonsville rather than being destroyed in accordance with the usual practice" (App. 5a).

The jury undoubtedly concluded that Mr. Cronin did in fact have the Emcasco report in his possession during the one hour conference on June 7, 1967, and denied knowledge of its existence.

John Carroll, who wrote the Emcasco report, and had been an inspector at the Catonsville branch of Retail Credit for five years, testified that the old reports are held for a five year period (depending on the nature of the report) (Jt. App. 125, 129). The old reports are used to verify findings in the preparation of new reports (Jt. App. 58, 69, 83-84, 125, 129, 262-264). On June 27, 1966 when the Employers Mutual report was prepared, and again on May 18, 1967 when the Paramount report was prepared, the various older reports, dating back to 1965, had not been destroyed and were use as references (Jt. App. 20, 58-59, 62, 132). In addition, the Paramount report used the same language as the old 1965 and 1966 reports (Jt. App. 23-27).

Retail Credit's insistence that the Emcasco report was destroyed when the Paramount report was written is inconsistent with its substantiated routine procedures. Mr. Copperamith, who wrote the Paramount report, did not indicate, even remotely, that he destroyed previous reports.

Though Petitioner's file had been sent to the Westminster Sub-Office on May 18, 1967, when the Paramount report was prepared, there was ample evidence that the file had been returned to Catonsville by June 7, 1967 (Jt. App. 91, 125, 158). Mr. Feeney, the current branch manager of the Catonsville Office, testified that after the original report is mailed to the customer directly from the sub-office, the "file and inquiry is sent to the branch office where it is reviewed again" (Jt. App. 141, 158). Mr. Cronin took the Paramount report from Mrs. Atwell's permanent file on the day of the conference. The jury could have concluded that the file had been returned from Westminster to Catonsville, where it would ordinarily be maintained, and that the Emcasco report was part of that file.

B.

> "Mr. Cronin had no better basis for inferring the contents of the Emcasco report from that than did Mrs. Atwell" (App. 5a).

It is undisputed that Mr. Cronin had the Paramount report in his possession (Jt. App. 248, 261), and it is probably a finding of the Jury that Petitioner had never actually seen this report (Jt. App. 114-116). Mr. Cronin had years of experience with credit reports and could have inferred from the four corners of the Paramount document the date of Emcasco and that the Emcasco report was similar in contents to the one he had in hand. Even if Mr. Cronin didn't have the Emcasco report (which Petitioner disputes), he had a better basis for knowing its date and contents than did the Petitioner who could scarcely be expected to deduce from the remarks made to her by Mrs. Cowan that there had been an earlier derogatory report to Emcasco, much less the exact date the Emcasco report has been written.

C.

> "regardless of whether any conduct at or after the June 7, 1967 interview could be said to constitute fraud, *it concealed nothing from Mrs. Atwell.* Her own testimony establishes beyond question that before she began the interview she knew, or should have known, *that the defendant had furnished a report to Emcasco with the same or similar information as that contained in the May 18 report.*" (App. 5a).

The fact of the matter is, that on June 7, 1967, Petitioner did not know of the existence of a libelous report sent by the Defendant to Emcasco on June 27, 1966, which constituted her cause of action (Jt. App. 208). Perhaps had she been wise to the ways of the business world, she might have concluded, after her cancellation by Emcasco on May 2, 1967, her interview with Mr. Murphy on May 4, 1967, and her conversation, in early June, 1967, with Mrs. Cowan, who related to her the substance of the Paramount report (not mentioning other reports from Retail Credit Company) (Jt. App. 116-117, 203, 205, 208), that the Defendant had written a derogatory report to Emcasco in May of 1967, which brought about the cancellation at the time. However, she had no way of knowing that the derogatory information had been sent to Emcasco as far back as June 27, 1966 almost a year prior to the cancellation notice and that her cause of action was in danger of being barred by the statute of limitations. Her only logical conclusion would have been that the Defendant had written a derogatory report to Emcasco in May of 1967, and that she would have a reasonable period of time to investigate the matter before filing suit. This all important fact, the date of the Emcasco report, was concealed from her, and prevented her from taking immediate action to preserve her rights.

The fact that neither the Plaintiff nor her attorneys knew of the existence of the June 27, 1966 report is further confirmed by Petitioner's original Complaint, which does not mention Emcasco. It was necessary for Plaintiff to amend her original Complaint to include suit on that report, after discovery proceedings revealed to her the existence of the Emcasco report.

D.

"furthermore he (Cronin) had no reason to supply her with information which he believed she already had" (App. 5a).

The jury, after observing the demeanor of the witnesses and analyzing their testimony, could have concluded from the evidence, that Mr. Cronin did not believe, during the interview of June 7, 1967, that Jo Anne Atwell had all the material information concerning her cause of action to which he had access. As previously stated, the jury would have been justified in inferring that Mr. Cronin had the copy of the Emcasco report, which was part of Jo Anne Atwell's permanent file, during the interview. Significantly, Cronin concealed the Paramount report in his desk drawer during the entire conference which lasted more than an hour (Jt. App. 205-206, 261-264). Was this necessary if he believed that Petitioner also had a copy of the Paramount report at the conference? Even if he did so believe, would he also believe that possession of the Paramount report would lead her directly and unerringly to the knowledge of the libelous contents of Emcasco?

At the beginning of the conference, Mr. Cronin testified that Jo Anne Atwell informed him that the company had made an investigation about her which wasn't true, and that she had obtained this information from a good friend.

He recalls that she took out a piece of paper and quoted some lines of words from the report and said that her friend had gotten this information for her (Jt. App. 246). Though Petitioner later stated that she had the Paramount report, Mr. Cronin's actions throughout the conference indicated he did not believe Mrs. Atwell. Otherwise, why would he conceal the report in his desk?

His actions, during this conference, did not give the appearance of a forthright discussion between two people who have equal knowledge of a factual situation, but rather, gave the impression that he was attempting to lull the Plaintiff into a sense of security and inaction by concealment, unfulfilled promises, statements of half truths, temporizing and in some instances, outright lies.

Specifically, Cronin lied to Petitioner when he told her that he did not know of the existence, date and contents of the Emcasco report. Indeed, although she specifically requested him to inform her of the existence of other reports that Retail Credit might have written about her, he denied having any of her files in his office, despite the fact that he was concealing the Paramount report in his desk which report had been taken from her permanent file (Jt. App. 205-206, 208, 261, 262-264). He represented to Petitioner that Retail Credit would not change its report unless she signed a paper he called "just an authorization" (Jt. App. 208, 233), which Retail Credit later claimed to be a complete release. He temporized with the Petitioner by suggesting a plan, whereby he would have his company reinvestigate and get back to her in two or three weeks, at which time she would be informed of the companies to whom previous reports had been sent, so that she could then designate to whom the corrected report would be sent (Jt. App. 208, 248, 255-256, 263). The two or three week period was set by Mr. Cronin, and conveniently covered

that crucial period when the statute of limitations was about to run. Proof that a reinvestigation did not take this long, was shown by the fact that between June 7, 1967 and June 27, 1967, four investigations had been completed by Retail Credit (Jt. App. 251-252). This conduct on the part of the Defendant and its agents amounted to temporizing, from which the jury could have found fraudulent intent or timely concealment of her cause of action. Moreover, the jury could have found that the Defendant had no intention of carrying out this plan, since the Defendant was not in the practice of reporting to companies who no longer had an insurable interest in the party (App. 256, 263, 295, 298). None of the promises that Defendant made to the Plaintiff were ever fulfilled. The Defendant continued to conceal the existence of the Emcasco report until such time as its attorney was forced to produce the report in discovery proceedings after suit was filed on the Paramount report. The fact that Mrs. Atwell retained an attorney by June 19th to handle her claim against Retail Credit based on the Paramount report in no way negated the fraudulent concealment practiced upon her on June 7, 1967 and thereafter with regard to the Emcasco report.

It is respectfully submitted that the evidence did support a finding of fraudulent concealment. Maryland Courts have always maintained that if there be any legally relevant and competent evidence, *however slight*, from which a rational mind could infer a fact in issue, then a trial court has invaded the province of the jury by declaring a directed verdict. *Geschwendt v. Yoe*, 174 Md. 374, 381, 198 A. 720 (1938). Judge Horney, for the Court, in *Smack v. Jackson*, 238 Md. 35, 37, 207 A. 2d 511 (1965) stated the rule succinctly when he said:

> "A party is not entitled to a directed verdict in his favor unless the facts and circumstances are such as

to permit of only one inference with regard to the issue presented".

In conclusion, it is submitted that the findings of fact by the Court of Appeals ignore the record with the result that Petitioner has been deprived of her Constitutional Right to Trial of her case by Jury, in conflict with the Seventh Amendment and the decisions of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

JAMES D. NOLAN,
Attorney for Petitioner.

JOHN T. ENOCH,

BERNARD J. SACHS,
Of Counsel.

APPENDIX A

United States Court of Appeals
For The Fourth Circuit

No. 13,727

Jo Anne Atwell,

Appellee.

versus

Retail Credit Company,

Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Edward S. Northrop, District Judge.

(Argued April 10, 1970 Decided September 30, 1970)

Before HAYNSWORTH, Chief Judge, and BRYAN and BUTZNER, Circuit Judges.

Francis D. Murnaghan, Jr., (George C. Doub, Jr., and Venable, Baetjer & Howard; and E. D. DeVaney, Jr., on brief) for appellant, and John T. Enoch (Bernard J. Sachs, Daniel E. Liebfeld and Goodman, Meagher & Enoch on brief) for Appellee.

Haynsworth, Chief Judge:

The dispositive issue in this appeal from a judgment for the plaintiff for libel committed in the dissemination of a

confidential credit report is whether the claim is barred by the Maryland one year statute of limitations (Md. Code Ann. Art. 57 § 1). We find that it is, and direct entry of judgment for the defendant.

In 1965 Mrs. Atwell began to have difficulties regarding automobile insurance. From October 10 through some time in 1967 she experienced a series of unexplained cancellations and refusals to issue new insurance by several companies. Through inquiries made at the office of the Maryland Insurance Commission, she learned that her difficulties stemmed from derogatory information about her character and reputation furnished to the companies with whom she had applied for insurance coverage.

In May 1967 Eunice Evans, a friend of Mrs. Atwell's who was employed by an insurance company, undertook to procure on her behalf (whether it was at her request or direction was sharply disputed at trial but is not relevant to this issue) a report similar to the reports previously furnished to other companies. Pursuant to Miss Evans' request, ostensibly made on behalf of her employer, the defendant sent a report on Mrs. Atwell dated May 18, 1967. Miss Evans took the report home with her, and its contents were disclosed to Mrs. Atwell.

On June 7, 1967 Mrs. Atwell called at the office of Mr. J. A. Cronin, the manager of the defendant's Catonsville, Maryland office, to discuss the situation. Although there is some dispute as to parts of the conversation, she did tell him that she had in her possession a copy of the May 18 report and that she had consulted an attorney about it, asserted that the derogatory information contained in it was false, and demanded that it be corrected. It was agreed that a new investigation would be conducted, and arrangements were made for further contact between Cronin and Mrs. Atwell.

Twelve days later, before the new investigation was completed, Mrs. Atwell's attorneys informed the defendant by letter that they represented her in connection with a claim

for libel and slander. The action was instituted on September 8, 1967 in the Superior Court of Baltimore and was thereafter removed by the defendant to the district court.

The law of Maryland controls our resolution of the issues presented. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64; *Guaranty Trust Co. v. York*, 326 U.S. 79.

The action for libel is founded on the report of May 18, 1967 and on a similar report of June 27, 1966 furnished by the defendant to Employer's Mutual Casualty Company (Emcasco).

Under Maryland law an action for libel or slander must be brought within one year after the cause of action accrues, Md. Code Ann. Art. 57 § 1, unless the defendant fraudulently concealed the cause of action from the plaintiff so as to prevent its discovery by the exercise of due diligence. Md. Code Ann. Art. 57 § 14; *New England Mutual Life Insurance Co. v. Swain*, 100 Md. 558, 60 A. 469. It is settled in Maryland that a cause of action accrues at the time the wrong was committed, not at the time of its discovery. *Killen v. George Washington Cemetery, Inc.*, 231 Md. 337, 190 A. 2d 247, and cases cited therein.

Although the Maryland courts have recognized limited exceptions as to particular causes of action not relevant here,[1] there is no exception for libel, nor have we any

[1] The principal exception is in actions for medical or other professional malpractice. See Mattingly v. Hopkins, 254 Md. 88, 253 A. 2d 904; Mumford v. Staton, Whaley & Price, ... Md. ..., 255 A. 2d 359. The exception for professional malpractice cannot fairly be described as a possible opening wedge to a general change in the Maryland rule; it is an exception of long standing, having been applied as early as 1917. The reasons for Maryland's application of the "discovery of the wrong" rule in professional malpractice cases — the relation of trust, reliance on professional expertise, and the likelihood that injury will not occur simultaneously with the wrongful act or omission — are all peculiarly related to the nature of professional conduct. None of them are present in an action for libel, in which there is no contractual or other relation of trust, no reliance, and in which the principal injury occurs when the libel is published.

reason to suppose that this case, were it being tried in the state courts, would provide an occasion for the creation of an exception. Thus, any action based on the Emcasco report, published more than a year before this action was instituted, is barred unless the defendant fraudulently concealed its wrong from Mrs. Atwell.[2]

The mere fact that the report was intended for private use does not constitute fraudulent concealment.[3]

Fraudulent concealment is asserted in Mrs. Atwell's June 7, 1967 conversation with Mr. Cronin. At that time, she argues, she was ignorant of the existence of the Emcasco report, which furnished the basis of an action which would have been timely if filed at that time. During the interview, she urges, Mr. Cronin made false and fraudulent statements designed to keep her in ignorance. She also argues that in failing to inform her two weeks later, as promised, of information other than what she already had, there was a breach of duty constituting fraud.

A review of the record convinces us that there was no evidence to support a finding either that fraud was practiced or that the cause of action was concealed from Mrs. Atwell. Principal reliance is placed on the inference that at the time of the interview Mr. Cronin had in his possession a copy of the Emcasco report and falsely stated that he did not. This inference is totally unsupported. It is established that he did have a copy of the May 18, 1967 report, which made reference to the fact that a report had been furnished to Emcasco. However, the uncontradicted evidence was to the effect that the defendant regu-

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[2] Although the report which Miss Evans procured was published within one year preceding the institution of this action, no damages were awarded based on that report, nor could any award of damages have been founded on it, since it was procured on Mrs. Atwell's behalf and its contents were revealed to no one other than those persons to whom she herself revealed them.

[3] See Peacock v. Retail Credit Co., 5 Cir., ... F. 2d ....., affirming 302 F. Supp. 418. *Peacock* dealt with a Georgia statute similar to Md. Code Ann. Art. 57 § 14.

larly destroyed old reports when an updated report was prepared on the same person giving similar information to that contained in the prior report. There was no evidence indicating a possibility that this was not done here. Such evidence as exists is entirely to the contrary. At the time the case was tried, it was established that the defendant had no copy of the Emcasco report, and it was necessary to procure a copy from Emcasco. In addition, it was established, and Mrs. Atwell relies on the fact, that on May 18, 1967, when the report obtained by Miss Evans was prepared, the defendant's copy of the Emcasco report was not in Catonsville. Nothing in the record will support an inference that it was returned to Catonsville rather than being destroyed in accordance with the usual practice.

Even if Mr. Cronin did not have the Emcasco report, it is argued that he knew of its contents at the time of the interview. Again, the only basis for this conclusion is the mention in the May 18 report that prior reports had been furnished. Mr. Cronin had no better basis for inferring the contents of the Emcasco report from that than did Mrs. Atwell. Furthermore, he had no reason to supply her with information which he believed she already had; both testified that she told him during the interview that she had the May 18 report in her pocketbook at that time, and Mr. Cronin testified without contradiction that she indicated detailed knowledge of its contents.

Finally, even accepting as true Mrs. Atwell's testimony that Mr. Cronin promised to report further to her two weeks after the interview, and accepting also that the undertaking to supply further information contemplated supplying details about the Emcasco report,[4] the failure to do so cannot be held to be a fraud in light of the fact that before the two week period expired Mrs. Atwell had engaged attorneys to bring this action, and the defendant had been notified of the fact.

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[4] Probably the only reasonable construction that can be placed upon Cronin's promise was to procure further investigation looking toward the possibility of a correction of the adverse information.

Although our finding that no fraud was practiced is sufficient to warrant reversal, it is required on the additional, and perhaps more compelling, ground that regardless of whether any conduct at or after the June 7, 1967 interview could be said to constitute fraud, it concealed nothing from Mrs. Atwell. Her own testimony establishes beyond question that before she began the interview she knew, or should have known, that the defendant had furnished a report to Emcasco with the same or similar information as that contained in the May 18 report.

After she received a notice of cancellation from Emcasco, Mrs. Atwell sought the assistance of Mr. Thomas Murphy of the Maryland Insurance Commission to learn the reason for the repeated cancellations. Although at the trial Mr. Murphy could not recall details of the conversations, Mrs. Atwell testified that he told her he had learned the reasons for the cancellations, and that he stated those reasons, in general terms having to do with adverse reports on her personal life, to her by telephone.

Shortly afterward, the May 18 report was procured, and the information it contained was in some way furnished to Mrs. Atwell.[5] This report contained in detail the derogatory statements to which Mr. Murphy had referred. The correspondence between the information in the report and the statement made by Mr. Murphy was so clear that no reasonable person could have failed to infer that a similar report had been furnished to Emcasco. This concurrence was reinforced by a statement in the May 18 report that

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[5] It is difficult to arrive at any conclusion as to the manner and form in which she received the information in the May 18 report. She told Mr. Cronin at the interview that she had a copy of it in her possession at that time. In her deposition and in answer to interrogatories she testified that she had not received a copy of the report but that Miss Evans had orally given her the information. At the trial she testified that she had never spoken with Miss Evans and had received the information through an intermediary. In any event, the information was made available to her and in some form was in her possession at the time of the interview.

the defendant had previously reported to Emcasco about Mrs. Atwell on June 27, 1966.

Well before the interview commenced, Mrs. Atwell knew that the defendant, in the business of furnishing reports to insurance companies, had furnished one report on her which contained derogatory information. She knew or should have known that Emcasco's cancellation was based on information substantially identical to that furnished by the defendant to Miss Evans' employer. She knew or should have known that the defendant had furnished a report on her to Emcasco and that it was furnished on June 27, 1966; and she had every reason to believe that it was the same report on which Emcasco based its cancellation. No more was required for her to have knowledge of the facts constituting her cause of action. That she did know all these facts is further strongly suggested by the fact that, without waiting for any further information after the interview, she engaged attorneys to prosecute her claim for libel. Nothing occurring at the interview could have resulted in concealment of the cause of action. One cannot conceal from a person what he already knows. The evidence admits of no other conclusion.

Since the evidence failed to support a finding of fraudulent concealment, the defendant was entitled to judgment on its defense of limitations. The judgment for the plaintiff will be reversed and the case remanded for entry of judgment for the defendant.

Reversed and remanded.

United States Court of Appeals
For The Fourth Circuit

No. 13,727

Jo Anne Atwell,

Appellee,

v.

Retail Credit Company,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Edward S. Northrop, District Judge.

ORDER

(Filed November 4, 1970)

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be and is hereby denied.

For the Court:

ALBERT V. BRYAN,
United States Circuit Judge.

A True Copy, Teste:

SAMUEL W. PHILLIPS, Clerk.
By JO ANN KIRKPATRICK,
Deputy Clerk.

(Seal)

APPENDIX B

ANNOTATED CODE OF MARYLAND
ARTICLE 57.
LIMITATIONS OF ACTIONS.

§ 1. *Actions other than those upon specialties.*

All actions of account, actions of assumpsit, or on the case, except as hereinafter provided, actions of debt on simple contract, detinue or repleven, all actions for trespass for injuries to real or personal property, all actions for illegal arrest, false imprisonment, or violation of the twenty-third, twenty-sixth, thirty-first and thirty-second articles of the Declaration of Rights, or any of them, or of the existing, or any future provisions of the Code touching the writ of habeas corpus or proceedings thereunder, and all actions, whether of debt, ejectment or of any other description whatsoever, brought to recover rent in arrear, reserved under any form of lease, whether for ninety-nine years renewals forever, or for a greater or lesser period, and all distraints issued to recover such rent shall be commenced, sued or issued within three years from the time the cause of action accrued; and all actions on the case for libel and slander and all actions of assault, battery and wounding, or any of them, within one year from the time the cause of action accrued. (An. Code, 1951, § 1; 1939, § 1; 1924, § 1; 1912, § 1; 1904, § 1; 1888, § 1; 1715, ch. 23, § 2; 1861, ch. 73; 1884, ch. 502; 1933, ch. 54; 1951, ch. 679.)

* * * * * *

§ 14. *Ignorance of cause of action induced by fraud.*

In all actions where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring suit shall be deemed to have first accrued at the time at which such fraud shall or with usual or ordinary diligence might have been known or discovered. (An. Code, 1951, § 14; 1939, § 14; 1924, § 14; 1912, § 14; 1904, § 14; 1888, § 13; 1868, ch. 357.)